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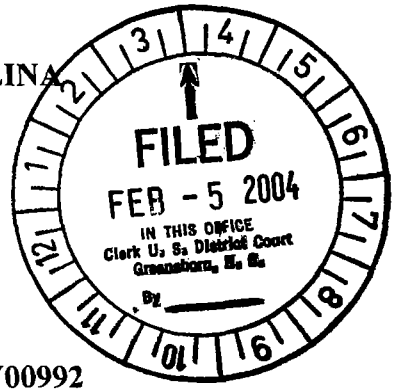
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



JOHN McCULLOUGH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**1:02CV00992**
	)	
ARAMARK EDUCATIONAL SERVICES, INC.,	)	
	)	
Defendant.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff John McCullough brought this civil action against Defendant Aramark Educational Services, Inc. ("Aramark"), claiming that Aramark violated the overtime pay provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, while employing Plaintiff as a sous chef. Plaintiff McCullough seeks to recover unpaid overtime wages, liquidated damages and attorney's fees for work he performed for Aramark over a 10-month period in 2001 and 2002. Aramark answered the complaint, denied the material allegations of the complaint, and asserted affirmative defenses. The parties were granted a period of discovery in order to develop the factual record relevant to Plaintiff's claims and Defendant's defenses.

At the close of discovery, Aramark moved for summary judgment. (Pleading No. 25.) McCullough responded, and Aramark replied. Following the filing of these motion papers, Aramark moved to strike portions of Plaintiff's supporting affidavits. (Pleading No. 39.) Plaintiff moved to strike Aramark's summary judgment reply brief. (Pleading No. 45.) All of these matters are now before the Court for a ruling.

Turning first to Aramark's summary judgment motion, the Court notes that Aramark grounds its motion upon the contention that Plaintiff McCullough, as a matter of law on the evidentiary record properly before the Court, was employed by Aramark as a salaried employee in a bona fide "executive" and "administrative" capacity as those terms are defined in the FLSA, and was therefore exempt from the overtime pay provisions of the Act. *See* 29 U.S.C. § 213(a)(1) ("any employee employed in a bona fide professional, administrative, or executive capacity" is exempt from overtime pay requirements of the FLSA). If the summary judgment record conclusively shows this to be true, Plaintiff's claims in this action must fail completely.

The Factual Record before the Court

On summary judgment review, the Court views the evidence in the light most favorable to the non-moving party, Plaintiff McCullough in this case. Further, the Court may consider only such evidence as is competent under Rule 56(e). *See* Fed. R. Civ. P. 56(e) ("[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") As noted above, Aramark has moved to strike portions of Plaintiff's affidavits as incompetent and inadmissible. That motion will be addressed below. For purposes of the factual summary set out in this section, the Court does not include evidence challenged in the motion to strike.

Plaintiff McCullough was hired by Aramark on July 25, 2001, as a sous chef at the Friday Center, a conference center at the University of North Carolina at Chapel Hill. Aramark was at that time opening a new account to provide for food services at the university, an account previously held by Marriott.

The job description for the position offered by Aramark read as follows:

> Sous Chef
> Aramark Job Code
>
> Administrative authority, responsibility and accountability necessary to direct the food production and presentation to the guest and staff as directed by the Executive Chef. To supervise the daily food production operations and may be responsible for requisitioning food form (sic) vendors. To consistently use food production methods in accordance with current federal, state and local standards, guidelines and regulations that govern the facility. Must also comply with management and organizational policies, procedures and the Executive Chef's instructions. Responsible for scheduling and training all kitchen personnel. Directly supervises all kitchen personnel with responsibility for assisting the Executive Chef in hiring, discipline, performance reviews and initiating pay increases. Must participate in management team meetings necessary to the success of the operation. To ensure that the customer's expectations are consistently exceeded at all times with the maximum fiscal responsibility.

(Pleading No. 26, Def.'s Mem. in Supp. of its Mot. for Summ. J., Ex. E.) The resume Plaintiff submitted to Aramark included a summary that read, "[a] dedicated professional with twelve years of experience in food preparation and management. Broad knowledge of various cuisines and cooking techniques." *Id.*, Ex. B. Plaintiff listed a number of prior employments, most of which included responsibilities for management and supervision of kitchen staff. *Id.*

Aramark hired Executive Chef Dennis Mann approximately one month before it hired Plaintiff as sous chef. Chef Mann was responsible for "the entire culinary operation" for the Friday Center and Carolina Catering, the university catering operation. The Friday Center and Carolina Catering had the same kitchen and employees. Everyday, the kitchen employees prepared a high volume of baked goods, cold foods, and hot foods.

During Plaintiff's pre-hire interview with Chef Mann, Plaintiff learned that his average work week might extend to 50 hours or more per week, although Aramark did not like to work its salaried

employees more than fifty hours a week. (Def.'s Mem., Ex. C, McCullough Dep. at 64-67.) Plaintiff also understood that he was applying for an exempt, salaried position, and that he would not be paid overtime pay for hours in excess of 40 per week. *Id.* at 68-70. Plaintiff began working for Aramark on July 25, 2001, with a starting salary of $576.92 per week, or $30,000 per year. (Def.'s Mem., Ex. F.) Additionally, Plaintiff received a $500 sign-on bonus. Plaintiff's position made him eligible for various benefits, including medical coverage, disability insurance, life insurance, and a retirement plan.

Chef Mann testified on deposition that Plaintiff McCullough, as a salaried sous chef, was "expected to manage the business." (Def.s Mem., Ex. D, Mann Dep. at 52.) According to Chef Mann, Plaintiff was responsible not only for food production himself, but also for supervising the production of food by others. Mann testified that Plaintiff, as a salaried employee, served as a witness on several occasions when Mann disciplined, counseled, or fired other employees. *Id.* at 68-74. On one occasion, Plaintiff, acting on his own initiative, informally counseled an employee regarding the correct procedure to follow if she were going to be late for work. (McCullough Dep. at 98.) Chef Mann testified that Plaintiff had authority to send employees home in order to manage labor costs. (Mann Dep. at 49.) Mann stated that Plaintiff was "second in command" and that he was expected to take control in Mann's absence. *Id.* at 44. Plaintiff was to ensure that each department ran as it should and as efficiently as it could. Plaintiff was responsible for ordering "mainly produce," but not other goods or supplies, and he assisted in planning daily menus. *Id.* at 82. Plaintiff was to handle customer complaints in Mann's absence.

Plaintiff McCullough's evidence tends to show that from the outset of his employment he was placed on the line to cook, working 70 to 80 hours each week. (Pl.'s Mem. of Law in Supp. of

his Response to Def.'s Mot. for Summ. J., McCullough Dep. at 76; and Mann Dep. at 20-25, 74.) Plaintiff testified on deposition that he never received a job description for his position as sous chef. He stated that when he started working for Aramark there were eight people in the kitchen besides Chef Mann and Plaintiff. There were three or four employees at the dish station, two in the pantry, one or two in the bakery department, and one clerk. All of these positions were considered "subordinate" to Plaintiff's position as sous chef. Plaintiff testified, however, that none of these employees reported to him; all reported to Chef Mann. When Plaintiff started work, there were two line cooks under him, but that number soon dropped to one. Plaintiff testified that if a bakery employee had a problem and Chef Mann was not there, he was supposed to see Plaintiff; but Plaintiff also testified that "Dennis Mann was always there." (McCullough Dep. at 79-82.) Chef Mann and Plaintiff worked virtually identical hours and workweeks throughout Plaintiff's employment. (Mann Dep. at 74.)

Plaintiff testified on deposition that he had no management function while working for Aramark. (McCullough Dep. at 84.) Plaintiff directs the Court's attention to two organizational charts produced by Aramark during discovery. (Pleading No. 36, Pl.'s Mem. of Law in Supp. of his Response to Def.'s Mot. for Summ. J., McCullough Aff. ¶ 2, Ex. 1.) These charts show at least three line cooks under the sous chef to prepare hot foods. In practice, however, Aramark consistently kept sous chef McCullough and only one hourly cook on staff to prepare hot food, along with Chef Mann. McCullough and Chef Mann both testified that Plaintiff spent ninety-five percent of his work time on the line "preparing the food." (Mann Dep. at 94-95; McCullough Dep. at 145, 153.)

Plaintiff testified that, although he was classified as a salaried manager, in the ten months he worked as a sous chef for Aramark, he never scheduled employee work shifts; never sent employees

home when they approached an overtime situation; never trained an employee; never interviewed, hired, or fired an employee; never disciplined or counseled employees (except that he sat in as a witness in some disciplines, and once informally counseled Donna Baldwin about the correct procedure to follow if she were going to be late); never evaluated employees; and never initiated employee pay raises. (Mann Dep. at 46, 60; McCullough Dep. at 175, 156, 85-103, 91; McCullough Aff. ¶ 13.)

Plaintiff McCullough resigned on April 30, 2002. Line cook Matt Alston was promoted on May 6, 2002, to the position of sous chef (viewing the evidence most favorably to Plaintiff), but he was designated as an hourly employee and given a $3 per hour raise, to $15 per hour. In his first two weeks as sous chef, Alston appears to have earned $652 with 2.3 hours of overtime and $782 with 8.1 hours of overtime. (Def.'s Mem., Ex. J; Pl.'s Mem., Ex. 2.)

The Summary Judgment Standard of Review

A party is entitled to judgment as a matter of law upon a showing that "there is no genuine issue of material fact." Fed. R. Civ. P. 56(c). The material facts are those identified by controlling law as essential elements of claims asserted by the parties. A genuine issue as to such facts exists if the evidence forecast is sufficient for a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists if the nonmoving party fails to make a sufficient showing on an essential element of its case as to which it would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In evaluating a forecast of evidence on summary judgment review, the court must view the facts and inferences reasonably to be drawn from them in the light most favorable to the nonmoving party.

When the moving party has carried its burden, the nonmoving party must come forward with evidence showing more than some "metaphysical doubt" that genuine and material factual issues exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), *cert. denied,* 481 U.S. 1029 (1987). A mere scintilla of evidence is insufficient to circumvent summary judgment. *Anderson*, 477 U.S. at 252. Instead, the nonmoving party must convince the court that, upon the record taken as a whole, a rational trier of fact could find for the nonmoving party. *Id.* at 248-49. Trial is unnecessary if "the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315-16 (4th Cir. 1993).

Discussion

The Fair Labor Standards Act requires employers to pay their employees time and a half for work over forty hours a week unless they are "employed in a bona fide executive, administrative, or professional capacity . . ." 29 U.S.C. §§ 207, 213(a)(1). In this action, Defendant Aramark moves for summary judgment on the ground that sous chef McCullough, throughout his employment with Aramark, was a bona fide executive and administrator and was therefore exempt from the overtime pay provisions of the Act.

The FLSA creates a test to determine who is an "executive" or "administrative" employee. The test includes both an "earnings" and a "duties" component. For employees earning more that $250 per week, as did Plaintiff, the employer can satisfy its burden to show exemption by meeting the requirements of the "short test." 29 C.F.R. § 541.1 (executive exemption); 29 C.F.R. § 541.2 (administrative exemption). Under the short test for the executive exemption, the "duties" component requires that the employee's "primary duty" (1) consist of the management of the

enterprise or a customarily recognized department thereof; and (2) include the customary and regular direction of the work of two or more employees. 29 C.F.R. § 541.1.[1]

Exempt status is an affirmative defense under the FLSA, and, therefore, Defendant Aramark bears the burden of proof on that issue. *See Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986). The "primary duty" test under 29 C.F.R. § 541.1 is an "extremely individual and fact-intensive" one, requiring examination of the full range of the employee's job responsibilities. *See Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 499 (D.N.J. 2000). A determination of what is "primary" depends upon what function is of "principal" or "chief" importance to the employer. *See Sturm v. TOC Retail, Inc.*, 864 F. Supp. 1346, 1353 (M.D. Ga. 1994). The court must consider which of the employee's duties involve management. *See Shockley v. City of Newport News*, 997 F.2d 18, 25-26 (4th Cir. 1993). Regulations of the Department of Labor describe five specific factors for determining "primary duty:" (1) time spent in the performance of managerial duties; (2) relative importance of managerial and nonmanagerial duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and the wages paid to employees doing similar nonexempt work. 29 C.F.R. § 541.103. A "good rule of thumb" is that "an employee who spends over 50 percent of his time in management would have management as his primary duty,"

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[1]Under the short test for the "administrative exemption," the duties component requires that (1) the employee's "primary duty" consist of office or nonmanual work directly related to management policies or general business operations, and (2) include "work requiring the exercise of discretion and independent judgment." 29 C.F.R. § 541.2. As applied to the work of Plaintiff McCullough, as Defendant has observed in briefing, the test for the administrative exemption and for the executive exemption are similar. The discussion in this opinion will be framed around the executive exemption but also resolves all issues relating to the administrative exemption.

but time alone is not the sole test, and an employee may be exempt even if less than 50 percent of the employee's time is spent on managerial duties. *Id.*

In the case at bar, both sous chef McCullough and Chef Mann have testified that Plaintiff spent 90 to 95 percent of his time cooking food on the line. Plaintiff often worked with only one line cook. Plaintiff's testimony, corroborated by Chef Mann, is that he worked about 70 to 80 hours per week. On the basis of this central line of evidence, Plaintiff argues that his "primary duty" was simply to cook food, not to fulfill management responsibilities. Plaintiff relies upon inferences from the evidence that Aramark planned for at least three line cooks to work under its sous chef, yet actually employed only one line cook during extended periods of time. Plaintiff's long hours, coupled with the fact that he cooked for 90 to 95 percent of those hours, strengthen the inference that, whatever Aramark may have intended when it hired Plaintiff, the reality of his job was that his "primary duty" was cooking.

Of course, an FLSA employee cannot create an issue of fact as to his primary duty, and avoid summary judgment, simply by voicing a subjective opinion that he was not a manager. *See, e.g., Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996). Instead, the Court must make a searching review of all the evidence of record. And even the rather extreme fact here that Plaintiff spent 90 to 95 percent of his time on the line cooking does not rule out a finding that his primary duty was executive or administrative in nature. This is true because it is "quite clear that an employee can manage while performing other work, and that this other work does not negate the conclusion that his primary duty is management." *See Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982).

The regulations applicable to the FLSA list a number of job duties as examples of "management" activities, including interviewing, selecting and training employees, directing employees' work, evaluating employee performance, disciplining employees, planning the work, determining the types of materials to be bought or stocked, and apportioning work among employees. 29 C.F.R. § 541.102. Not surprisingly, the parties focused their discovery on these very matters as they relate to Plaintiff's former work at Aramark. Perhaps also not surprisingly, the parties characterize the weight of the evidence on these matters quite differently. Defendant Aramark surveys the evidence and concludes that "Chef Mann and Plaintiff jointly handled interviewing, hiring, firing, disciplining, counseling, and supervising subordinate hourly employees at the Friday Center." (Def.'s Mem. at 9.) Looking at the same evidentiary record, Plaintiff opines that "[n]ot one example in the record exists to show that McCullough was in charge of and had as his primary duty the management of the Friday Center kitchen . . ." (Pl.'s Mem. at 9.)

In the Court's view, each party has overestimated its own case, and underestimated the other side's case. This is not a case where either party is entitled to judgment as a matter of law. There is conflicting evidence under the legal tests for determining whether Plaintiff should be found to be an exempt employee by virtue of his duties as an executive or administrator. At trial, a trier of fact will be required to weigh this evidence and resolve the material conflicts.

One or two specific examples of the conflicts in the evidence, beyond those readily apparent in the factual summary set out above, demonstrate the need for trial. Defendant Aramark cites evidence regarding the management activity of "planning the work" and concludes that Plaintiff "planned the menu." (Def.'s Mem. at 9.) On this point, Chef Mann was asked, "And did [Plaintiff] devise the menus?" He answered, "Yes. Let me make sure I'm very clear on this. When I write the

menu for the week, I write what the entrees are going to be. There's a lot to a menu, other than just entrees. Every day two soups have to be produced, a vegetarian entree, two fresh vegetables of the day, a starch, and that's it." (Mann Dep. at 82.) Chef Mann stated that the only thing he wrote was the entrees, and that the rest of the menu was devised each morning by the cooks, *including the line cooks*. *Id.* at 83 (emphasis added.) On the other hand, Plaintiff asserts in briefing that "Mann alone devised the menus," citing another portion of Chef Mann's deposition where he stated that "I develop the weekly menu." (Mann Dep. at 32.) Plaintiff, on deposition, emphasized that Mann devised the daily menus, but also allowed that 20 to 30 percent of the time it was "our choice" (referring to himself as sous chef and also to the line cook) as to what would be the complementary items. (McCullough Dep. at 173, 187-90.) Clearly, then, the evidence on the management activity of "planning the work" is mixed. There is certainly evidence that Plaintiff did some planning regarding complementary menu items, but there is also evidence that his role was limited and of no greater importance than that of the line cook working with him, and the line cook was clearly not a management employee.

Much the same pattern emerges when the Court considers the management activity of "determining the types of materials to be bought or stocked." In briefing, Defendant argues that "[Plaintiff] ordered produce for the kitchen," citing Chef Mann's testimony that Plaintiff placed orders for produce while Mann did the orders for everything else. (Def.'s Mem. at 9; Mann Dep. at 82.) Plaintiff testified that it took him all of ten minutes at the most each day to order the produce, but he also stated that he did not pay any bills, including produce bills, and he was not even trained to do inventory under Aramark's software program.

A number of the management activities the Court is to consider concern the manner in which Plaintiff related to other employees. Plaintiff's evidence is that he played no role whatsoever in evaluating other employees (Mann Dep. at 62-68; McCullough Dep. at 91), scheduling employee work shifts (Mann Dep. at 46; McCullough Dep. at 112-13), or training employees (McCullough Dep. at 156, 164). The evidence is mixed on activities such as interviewing, hiring, firing, and disciplining employees, as Aramark's evidence tends to show that Plaintiff was present, at least as a witness, when Chef Mann disciplined some employees (Mann Dep. at 90-92; McCullough Dep. at 85), and Plaintiff once informally counseled an employee concerning the procedure to use when she was to be late. (McCullough Dep. at 97-99.) And although Chef Mann testified that Plaintiff, as sous chef, was "second-in-command," it could reasonably be inferred from the evidence that Chef Mann was fully in charge when he was present, leaving Plaintiff little in the way of supervisory duty at such times, and Chef Mann was present at virtually all times when Plaintiff was at work. Under these circumstances, Plaintiff was seldom "in charge" of the kitchen. *Cf. Donovan*, 672 F.2d at 226-27 (a person "in charge" during his or her shift, with no superior manager present, has management as the primary duty even if that person spends a majority of the work day doing nonexempt work).

As noted earlier, in determining an employee's "primary duty" the Court should consider five factors, including (1) the time spent in managerial duties, (2) the relative importance of managerial and nonmanagerial duties, (3) the employee's discretionary powers, (4) the employee's relative freedom from supervision, and (5) the relationship between the employee's salary and the wages paid to nonexempt employees. The Court is to look at "the total picture," and the "presence or absence of any one factor is not determinative . . ." *See Thomas v. Jones Rests., Inc.*, 64 F. Supp. 2d 1205, 1214 (M.D. Ala. 1999). Having considered these factors, the Court concludes that the record in this

case does not compel a conclusion that Plaintiff's primary duty for Aramark was executive or administrative in nature. There is evidence, a portion of which is cited above, that could reasonably support a finding that Plaintiff spent very little time in managerial duties; that his nonmanagerial duty of cooking food was more important to Aramark because the kitchen was so understaffed that Plaintiff was required to cook for 70 or more hours per work simply to sustain the heavy food production of the kitchen; that Plaintiff only occasionally exercised discretion; that Plaintiff was closely and directly supervised by Chef Mann during nearly all of his work time; and that Plaintiff was generally paid more than a line cook, but overtime work by the line cook could cause him to be paid more than Plaintiff for similar work. Needless to say, the evidence could also be weighed differently by a trier of fact, and the trier of fact could conclude that Plaintiff's primary duty in his work for Aramark was in fact executive or administrative in nature. In other words, there is mixed evidence and the matter is for trial, not for summary adjudication. Aramark's motion for summary judgment should be denied.

Also before the Court are two other motions filed by the parties. Aramark's motion to strike portions of the affidavits submitted by Plaintiff should be dismissed as moot since the Court has not considered the evidence challenged by Aramark during its summary judgment review and nonetheless has found that summary judgment does not lie for Aramark. Plaintiff's motion to strike the reply brief of Defendant should be denied. The reply brief, for reasons shown in Aramark's response, was not untimely; further, it is not subject to being stricken as merely repetitious of earlier argument since the reply brief fairly addresses matters newly raised in Plaintiff's response.

Conclusion

For reasons set forth above, **IT IS RECOMMENDED** that Defendant's motion for summary judgment (Pleading No. 25) be denied, that Defendant's motion to strike affidavits (Pleading No. 39) be dismissed as moot, and that Plaintiff's motion to strike Defendant's reply brief (Pleading No. 45) be denied. The parties should continue to prepare for trial during the Master Calendar beginning April 5, 2004.

P. Trevor Sharp, U.S. Magistrate Judge

February 5th
~~January~~ , 2004